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No. 88–46

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RALPH C. BEHNING, *ET AL.*,

Petitioners,

v.

CAMELBACK SKI CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 8, 1988



QUESTION PRESENTED

Did the Maryland Court of Appeals properly conclude that Maryland courts cannot exercise "long-arm" jurisdiction over an out-of-state ski area where (1) the ski area had only minimal and sporadic contact with the forum; (2) Petitioner's visit to the ski area was not a result of any solicitation in the forum by Respondent; and (3) the Petitioners' cause of action did not arise out of a relation to Respondent's minimal forum contacts?

STATEMENT OF CORPORATE AFFILIATIONS

Pursuant to Supreme Court Rule 28.1, Respondent Camelback Ski Corporation states that it has no parent, subsidiary or affiliated corporations.

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STATEMENT OF THE CASE

Camelback Ski Corporation ("Camelback") operates one business at one site; a ski resort at Tannersville, Pennsylvania. The services Camelback provides are available only at its facility in Pennsylvania. It derives its total revenue from operation of that facility. App. A-2. Petitioner Ralph Behning was injured while skiing at Camelback and has sued, alleging negligence in the "design construction, maintenance, and 'grooming' of one of its ski slopes, and in the failure to correct, or give adequate warning of, an unreasonably dangerous condition on the land." App. A-1. The Maryland Court of Appeals has twice concluded that given Camelback's minimal contacts

with Maryland, the exercise of personal jurisdiction over Camelback by Maryland would violate Due Process in this case.

Camelback has no license or charter to do business in Maryland. (App. A-2) Camelback has no agent for service of process in Maryland, owns no real estate in Maryland, sells no services in Maryland, pays no Maryland taxes and derives no revenues from products used or services performed in Maryland. *Ibid.* It has neither bank accounts nor telephone listings in Maryland. *Ibid.* Camelback produces no goods and thus injects no goods into the "stream of commerce." *Ibid.* Again, its only revenues are derived from the operation of its facilities in Pennsylvania.[1]

Camelback is a "day" as opposed to "destination" resort. App. A-2, A-23. Typically, the clientele of a day resort comes for a day of skiing and returns home. *Ibid.* In contrast, a destination resort attracts skiers for extended periods of time. *Ibid.* Camelback's market area ranges from New York City to Philadelphia and Northern New Jersey, all within a 100-mile radius of Tannersville. *Ibid.* Camelback has a long-standing policy of not advertising or soliciting outside that area. App. A-23-24.

To the extent that others, such as bus tour companies, have used Camelback's name to sell their own product or service, they have done so without assistance from Camelback. App. A-24. In fact it is not clear that Camelback was even aware that its name was being so used in Maryland. *Ibid.*

This action has now been the subject of five decisions by the courts of Maryland. In the second of those decisions, (App. A-40–A-43) Judge Sfekas of the Circuit Court for

[1] In its most recent opinion the Court of Appeals stated that "Camelback did not devote its energy or financial resources to the marketing of Maryland. It allocated no part of its advertising budget to Maryland . . . ." App. A-9. All of that budget is committed to the area lying within a 100-mile radius of the facility. App. A-2. Accordingly, it is misleading for Petitioners to quote, out of context and without inclusion in the Appendix, deposition testimony (Pet. p. 5) that contradicts the Court of Appeals' determination concerning Camelback's lack of meaningful contacts with Maryland.

Baltimore County found that Camelback had only four, limited contacts with Maryland; (1) "dissemination of information" about Camelback in an annual magazine that was a compendium of ski resort information. The magazine was published and distributed in Maryland by an independent entity; (2) maintaining WATS telephone service for Maryland; (3) sending brochures to six or seven ski shops in Maryland upon their specific request; and (4) sending one employee on a one-time, one-day promotional trip to Maryland *two* years after Petitioners' injury, which trip produced absolutely no business.[2]

At every subsequent review, including both Petitions to this Court, Petitioners have attempted to impute substantial additional contacts to Camelback. The courts of Maryland have rejected every such effort to expand the relevant contacts. This Court should do likewise. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949). The decision below is largely fact-bound as well as legally correct.

In evaluating Camelback's forum contacts (and Petitioners' arguments for finding more extensive contacts), the Court of Appeals twice properly concluded that individually and collectively, those contacts are not the "continuous and systematic general business contacts" necessary to find general jurisdiction.

Similarly, the Court of Appeals rejected Petitioners' belated attempts to invoke "specific jurisdiction" finding

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[2] Although the forum contacts found are insufficient to sustain either general or specific jurisdiction here, Camelback has consistently objected to certain "contacts." In response to criticism of Judge Sfekas' findings by both Camelback and Petitioner the Court of Special Appeals ruled that the trial court's determinations were "not clearly erroneous." App. A-32. In its first opinion, the Court of Appeals apparently determined that contacts nos. 2 and 3 did not constitute contacts that would merit consideration in a long-arm jurisdiction analysis. App. A-26. The Court also rejected contact no. 4 as jurisdictionally irrelevant finding this "contact was of an isolated nature." App. A-24. In its second opinion, the Court of Appeals did not disturb those earlier determinations.

that "[t]here is no evidence that Behning went from Maryland to Pennsylvania in response to solicitation by Camelback" (App. A-7); and "Behning's trip to Camelback did not result from any solicitation by Camelback within this State." App. A-2.

SUMMARY OF ARGUMENT

As the Maryland Court of Appeals has twice concluded, it would violate Due Process for the courts of Maryland to exercise personal jurisdiction over Camelback. In reaching that conclusion, the Court acknowledged, reviewed, and carefully evaluated the pertinent decisions of this Court, as well as *Asahi Metal Industries.*[3] Further, this case is inappropriate for review because it presents no unique or novel issues. There are no issues present in this action, resolution of which would further or "fill-in" the Court's long-arm jurisprudence. And again, perhaps most importantly, this case stands correctly decided.

This case is a general jurisdiction case; a conclusion consistently reached below, conceded by Petitioners in the State courts, and compelled by the facts.[4] Camelback's contacts with Maryland are woefully short of those necessary to establish "continuous and systematic general business contacts." Personal jurisdiction cannot be based on specific jurisdiction principles either, because neither Petitioners' visit to Camelback nor their cause of action (essentially negligent operation of a resort) arise out of or relate to Camelback's meager contact with Maryland.

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[3] *Asahi Metal Industry Co.* v. *Superior Ct. of Calif.*, 480 U.S. _____, 107 S. Ct. 1026 (1987).

[4] Petitioners plainly misstate the central issue in this case when they frame it as whether the "fixed site nature of [Camelback] require[s] an assertion . . . of general jurisdictional powers . . . ." It is not the fixed site nature of Camelback that makes this a general jurisdiction case. Rather, there is not even a colorable argument for specific jurisdiction here because Petitioners did not travel to Camelback in response to solicitation in Maryland.

Finally, Petitioners' efforts to analogize this case to a products liability, "stream of commerce" case is like comparing "apples and oranges." In a products liability case the primary forum contact is the allegedly defective product, present and causing injury in the forum. The reason that Petitioners' attempted analogy is flawed is because it omits and ignores that *fundamental* aspect of a "stream of commerce" products liability case. *See* Pet. p. 8. For an enterprise such as Camelback that places no product in the stream of commerce, there simply is no forum contact comparable to the defective product, present in the forum, that exists in the "stream of commerce" case. Therefore the analogy fails.

ARGUMENT

The Court of Appeals Considered Its Prior Decision in Light of This Court's Intervening Decision in *Asahi Metal Industries Ltd.* V. *Superior Court of California* and Properly Concluded That The Exercise of Jurisdiction in This Case Would Violate Due Process

In twice concluding that it would violate Due Process for the courts of Maryland to exercise jurisdiction over Camelback, the Court of Appeals recognized and applied the pertinent decisions of this Court. Following remand, additional briefing, and further oral argument (App. A-1), the Court of Appeals added *Asahi* to its earlier analysis. The Court's discussion of *Asahi* (App. A-3–A-7) demonstrates that it seriously and thoughtfully evaluated that decision, its place in the overall jurisprudence of long-arm jurisdiction, and properly concluded that "[t]he specific holding of *Asahi* has no direct impact on our decision in this case." App. A-4.

Moreover, despite this obvious and correct conclusion, the Court of Appeals went further, reevaluating much of its prior decision and giving careful consideration to Petitioners' theory that a general jurisdiction case involving a fixed-site resort is indistinguishable from a products liability, stream of commerce action. App. A-8. The Court found this theory

"innovative" but "not persuasive." App. A-7. Clearly, the Court of Appeals has attempted to apply, and indeed correctly applied, the relevant decisions of this Court in concluding that Maryland lacks jurisdiction over Camelback.

Furthermore, there are no legal issues present in this case that warrant scrutiny by this Court or that will contribute to the development of long-arm jurisdiction jurisprudence. The Court of Appeals made the factual determination, unchallenged by Petitioners, that they did not travel to Camelback in response to any solicitation by Camelback. App. A-2, A-7, A-26. Accordingly, this case is not an appropriate vehicle to begin to resolve the issue of when a cause of action "arises out of or relates to" forum contacts.

Given the thoroughness of analysis and review below and the correctness of the result reached, no basis exists to issue a Writ of Certiorari.

Given Camelback's Limited Contacts With Maryland, and The Fact That Those Contacts Are Unrelated to Petitioners' Cause of Action, Neither General Nor Specific Jurisdiction Exists

Assuming *arguendo*, that the four "contacts" found by Judge Sfekas (pp. 2-3, *supra*) (or even the greater quantum of "contacts" advanced by Petitioner) represent all forum contacts to be considered in deciding this case, no jurisdiction can be found. By any measure, those contacts are not "continuous and systematic general business contacts" as that standard is described in *Helicopteros Nacionales de Colombia S.A.* v. *Hall*, 466 U.S. 408 (1984) and *Perkins* v. *Benguet Mining Co.*, 342 U.S. 437 (1952).[5] These "contacts" are non-continuous, un-systematic, and limited.

Neither can specific jurisdiction obtain because Petitioners' "trip to Camelback did not result from any solicitation by Camelback within this State." App. A-2; *Accord* App. A-33,

[5] Again, even considering the much more extensive inventory of "contacts" advanced by Petitioners here, there is no basis for imposing general jurisdiction. Those "contacts" are nothing more than examples

n.2. The absence of any causal link between Camelback's forum-related activities (limited solicitation) and Petitioners' mere presence at the resort, not to mention Petitioners' injury, places this case well short of the threshold for specific jurisdiction. The necessary "direct" or "proximate" relation between the forum contact and cause of action does not exist. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985).

Further, assuming *arguendo*, that one or more of Camelback's contacts did give rise to Petitioners' trip (which it did not), on the facts of this case there would still be no basis for upholding specific jurisdiction because those contacts, individually or collectively, do not meet the standard of "purposefully availing itself of the privilege of conducting activities" in Maryland. *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958). This is illustrated by Camelback's long-standing policy of not directing any of its promotional energy toward Maryland; an express policy against the purposeful affiliation with Maryland necessary to find specific jurisdiction. App. A-23-24. No doubt, it is because the particular and well-established facts of this case preclude application of specific jurisdiction as defined by this Court that the Petitioners opted to advance an unreasonable and unprecedented formulation of specific jurisdiction, which is discussed below.

The Jurisdictional Formulation Advanced By Petitioners Is Completely Inconsistent With The Decisions of This Court

While Petitioners' proposed formulation of the appropriate jurisdictional test may be "innovative" it is also completely wrong. In essence, Petitioners argue that because Camelback knowingly derives revenue from Maryland residents who come to the facility to ski and because Petitioners are from Maryland and were injured while skiing, Camelback had "fair warning" that it might be subject to suit in Maryland and therefore, jurisdiction is proper. Pet. p. 8. The Court of Appeals has similarly paraphrased Petitioners' argument. App. A-7.

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of further incidental, indirect, unpaid solicitation, and plainly do not constitute "continuous and systematic general business contacts."

In discussing *World Wide Volkswagen* v. *Woodson*, 444 U.S. 286 (1980) specifically, and stream of commerce cases generally, Petitioners assert:

> [I]t is not the presence of a product within the forum, but Defendant's participation in the promotion of or distribution of the product that gives the multi-state commercial Defendant the "fair warning" necessary to sustain jurisdiction.

Pet. p. 8. Plainly, Petitioners attempt to analogize this case to a products liability, stream of commerce action. Assuming *arguendo*, that such a comparison can be made, it is appropriate to employ the entire test. Yet, as the quoted passage vividly illustrates, Petitioners seek to utilize only a limited portion of the stream of commerce test, namely whether a defendant has "fair warning" that it may be subject to suit in the foreign forum. This formulation simply ignores the essential, first element of the stream of commerce jurisdictional test, the presence in the forum of the allegedly defective product. As is clear from the language quoted, Petitioners assert that the presence in the forum of the product is irrelevant. *Ibid.*

Yet, the presence of the product in the forum is the *primary forum contact* in the stream of commerce type action, *Worldwide Volkswagen, supra*, 444 U.S. at 295; *Asahi, supra*, 107 S. Ct. at 1031. Indeed, the critical area of dispute for the Court in *Asahi* was whether the presence of a defective product alone is enough to allow jurisdiction or whether further affiliating circumstances are necessary. In this case there was no injury-causing device that entered the forum. Thus Petitioners' basic formulation[6] is directly at odds with the very decision that prompted the Court to remand this action. To adopt the formulation advanced by Petitioner would vitiate much of the Court's recent work in this area and greatly expand the permissible exercise of long-arm jurisdiction.

[6] Again, as described by the Court of Appeals, Petitioners' formulation is: "Because Behning was one of a number of Maryland residents coming to Camelback to ski, and thus formed part of a stream-of-commerce from which Camelback knew it derived economic advantage," jurisdiction is proper. App. A-7.

CONCLUSION

In this case, neither general nor specific jurisdiction, as defined by this Court, can be exercised consistent with the requirements of Due Process. Thus, petitioner is forced to attempt to analogize an injury-causing defective product placed in the stream of commerce and present in a forum state with a fixed-site facility, remote from the forum, and placing no products in the stream of commerce. That analogy is seriously flawed, without support in the decisions of this Court, and affords no basis for issuance of a Writ of Certiorari.

Respectfully submitted,

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August 8, 1988

CERTIFICATE OF SERVICE

In accordance with Rule 28.3 of the Rules of the Supreme Court of the United States, I hereby certify that I have mailed this 8th day of August, 1988, three copies of Brief in Opposition to Petition for Writ of Certiorari to Dennis F. O'Brien, White, Mindel, Clarke & Hill, The Susquehanna Building, Sixth Floor, 29 West Susquehanna Avenue, Towson, Maryland 21204.

_____

Stephen P. Kling